

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Case No. 1:19-cr-227
(LJV)

Plaintiff,

V.

February 21, 2024

JOSEPH BONGIOVANNI,

Defendant.

TRANSCRIPT EXCERPT - EXAMINATION OF MICHAEL O'ROURKE - DAY 2
BEFORE THE HONORABLE LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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PRESENT:

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2 | COURT DEPUTY CLERK: COLLEEN M. DEMMA

* * * *

8 | (Excerpt commenced at 9:43 a.m.)

9 (Jury seated at 9:43 a.m.)

10 | THE COURT: Good morning, everyone.

11 **ALL PARTIES:** Good morning.

12 THE COURT: Welcome back.

The record will reflect that all our jurors are present.

15 I remind the witness that he's still under oath.

16 And I think we're ready to begin cross-examination.

17 | MR. MacKAY: May I proceed, Your Honor?

18 THE COURT: Yes.

20 **M I C H A E L O ' R O U R K E**, having been previously duly
21 called and sworn, continued to testify as follows:

23 | CROSS-EXAMINATION BY MR. MacKAY:

24 Q. Good morning, Mr. O'Rourke

25 A. Good morning, Mr. MacKay.

09:44AM

1 Q. How are you?

09:44AM

2 A. Good. How are you?

09:44AM

3 Q. I'm well, thanks for asking.

09:44AM

4 All right. So you testified here on direct yesterday,

09:44AM

5 and then you had the opportunity go home, correct?

09:44AM

6 A. Yes.

09:44AM

7 Q. Now when you testified yesterday, do you recall you

09:44AM

8 needed your memory refreshed at least once during your

09:44AM

9 testimony?

09:44AM

10 A. Yes.

09:44AM

11 Q. Okay. And I presume that's because the incident we're

09:44AM

12 all talking about happened now over a decade ago, correct?

09:44AM

13 A. That's correct.

09:44AM

14 Q. November of 2012, correct?

09:44AM

15 A. That's correct.

09:44AM

16 Q. And you recall when you were here in court yesterday,

09:44AM

17 Mr. Tripi refreshed your memory by pointing you to your grand

09:44AM

18 jury testimony; do you remember that?

09:44AM

19 A. I do.

09:44AM

20 Q. Okay. And that took place, you went into the grand jury

09:44AM

21 and you testified in June of 2020, correct?

09:44AM

22 A. That's correct.

09:44AM

23 Q. Okay. Now, at that point in time, when you testified

09:44AM

24 before the grand jury, you had with you a case report,

09:45AM

25 there's about 23 pages long; do you recall that?

09:45AM 1 A. I do.

09:45AM 2 Q. Okay. And that contained mostly the documents that the
09:45AM 3 state police had from the case, correct?

09:45AM 4 A. That's correct.

09:45AM 5 Q. Had some search warrant material in it, correct?

09:45AM 6 A. The documents I believe I had were a copy of the search

09:45AM 7 warrant, and a copy of the booking sheet, and several

09:45AM 8 photographs of the defendants.

09:45AM 9 Q. Okay. Do you recall either having at that time or having

09:45AM 10 looked at before you went into the grand jury -- about a --

09:45AM 11 call it a case report, it's about five paragraphs long?

09:45AM 12 A. I did not prepare that report, so I can't recall if I

09:45AM 13 reviewed that report or not.

09:45AM 14 Q. Would it help to refresh your recollection to take a look

09:45AM 15 at that report to see if that was something you reviewed

09:45AM 16 before you testified?

09:45AM 17 A. Yes.

09:45AM 18 **MR. MacKAY:** Okay. Ms. Champoux, can we, for the
09:46AM 19 witness only, put 3510C on the screen?

09:46AM 20 **BY MR. MacKAY:**

09:46AM 21 Q. Can you read that, or -- I can see you getting your
09:46AM 22 glasses out.

09:46AM 23 A. Yep.

09:46AM 24 Q. So if you look at that silently to yourself, and then
09:46AM 25 look back up at me.

09:46AM 1 A. I've seen that report before. I didn't prepare it, so I
09:46AM 2 can't recall exactly if I reviewed it before a grand jury or
09:46AM 3 not.

09:46AM 4 **MR. MacKAY:** And, Ms. Champoux, you can take down
09:46AM 5 3510C. Okay.

09:46AM 6 **BY MR. MacKAY:**

09:46AM 7 Q. But the document, is it fair to say that the documents
09:46AM 8 you did have before you in the grand jury and what you
09:46AM 9 reviewed before you went into the grand jury did not include
09:46AM 10 any notes or summary of any meeting with Mr. Bongiovanni?

09:46AM 11 A. That's correct.

09:46AM 12 Q. All right. And you had met with the government about six
09:47AM 13 months before going into the grand jury; does that sound
09:47AM 14 accurate?

09:47AM 15 A. Yes.

09:47AM 16 Q. Okay. Back in December of 2019 was your meeting with
09:47AM 17 them?

09:47AM 18 A. Yes.

09:47AM 19 Q. And you spoke with, I assume, some other type of law
09:47AM 20 enforcement, correct?

09:47AM 21 A. Yes, federal law enforcement.

09:47AM 22 Q. Okay. And perhaps prosecutors at that time?

09:47AM 23 A. I don't recall who was at the meeting other than at least
09:47AM 24 one agent from his.

09:47AM 25 Q. Okay. And at that time, you learned a little bit about

09:47AM 1 what this case was about, correct?

09:47AM 2 A. Yeah. I learned a small amount, I guess my involvement.

09:47AM 3 Q. I mean, you knew it was focused somewhere around this

09:47AM 4 November 25th, 2012 arrest, correct?

09:48AM 5 A. Yes.

09:48AM 6 Q. Okay. So let's go to that.

09:48AM 7 You, as part of the New York State Police, participate in

09:48AM 8 this arrest on 17 Elmview Place on November 25th, 2012,

09:48AM 9 correct?

09:48AM 10 A. That's correct.

09:48AM 11 Q. I think you told us on direct, in sum and substance what

09:48AM 12 happens is, you get some information from Illinois that calls

09:48AM 13 the New York State Police to act here in Buffalo, correct?

09:48AM 14 A. Yes.

09:48AM 15 Q. Simple way of explaining it, drugs are getting dropped

09:48AM 16 off and you make a bust right after that happens, correct?

09:48AM 17 A. That's true.

09:48AM 18 Q. And in doing that, you, the State police, arrest both

09:48AM 19 Damien Abbate and Wayne Anderson, correct?

09:48AM 20 A. Yes.

09:48AM 21 Q. Your involvement was primarily focused on Wayne Anderson,

09:48AM 22 correct?

09:48AM 23 A. Yes.

09:48AM 24 Q. There was somebody else dealing with Damien Abbate,

09:48AM 25 correct?

09:48AM 1 A. That's correct.

09:48AM 2 Q. That's Investigator Tony Palmer, correct?

09:48AM 3 A. That's correct.

09:48AM 4 Q. And generally you need -- you can't deal with all the

09:48AM 5 defendants on the scene at once, correct?

09:48AM 6 A. That's true.

09:48AM 7 Q. Okay. Now, place him in handcuffs, Mr. Anderson,

09:49AM 8 correct?

09:49AM 9 A. That's correct.

09:49AM 10 Q. You get him into your vehicle, your police vehicle,

09:49AM 11 correct?

09:49AM 12 A. That's correct.

09:49AM 13 Q. And then you take him down to central booking downtown,

09:49AM 14 correct?

09:49AM 15 A. That's right.

09:49AM 16 Q. And during that drive downtown, you talk to him a little

09:49AM 17 bit to try to -- to begin the conversation to potentially

09:49AM 18 flip him; is that fair to say?

09:49AM 19 A. Yes.

09:49AM 20 Q. Okay. And is it fair to say that oftentimes law

09:49AM 21 enforcement will talk during that ride because it can be a

09:49AM 22 stressful time for the defendant?

09:49AM 23 A. Yes.

09:49AM 24 Q. And this is a prime time when defendants often start

09:49AM 25 talking when they shouldn't, correct?

09:49AM 1 A. Sometimes it's the only opportunity we have to
09:49AM 2 communicate with the defendant before he goes to jail, so
09:49AM 3 it's always the best time to communicate with the defendant.
09:49AM 4 Q. And there's often a lot of pressure on the defendant at
09:49AM 5 that point in time, correct? Because they're facing charges,
09:50AM 6 correct?
09:50AM 7 A. Well, I'm sure they're in a very stressful situation.
09:50AM 8 They're in handcuffs, they're going to jail, they're probably
09:50AM 9 feeling quite a bit of pressure.
09:50AM 10 Q. So in your conversation with Mr. Anderson as he goes
09:50AM 11 downtown, he basically just said I'm not talking, I'm getting
09:50AM 12 a lawyer, correct?
09:50AM 13 A. Correct.
09:50AM 14 Q. And once an individual gets a lawyer, you know that you
09:50AM 15 can no longer speak directly to that individual, correct?
09:50AM 16 A. Correct.
09:50AM 17 Q. As members of law enforcement, you would now need to go
09:50AM 18 through that person's attorney, correct?
09:50AM 19 A. Correct.
09:50AM 20 Q. So the moment somebody says they want a lawyer, you can
09:50AM 21 no longer talk to them, correct?
09:50AM 22 A. Correct.
09:50AM 23 Q. Or the moment they enter a court and are either assigned
09:50AM 24 an attorney or they go out and pay an attorney who shows up,
09:50AM 25 you can't talk to them anymore, correct?

09:50AM 1 A. Correct.

09:50AM 2 Q. So if there's any cooperation to be done with an
09:50AM 3 individual or a defendant, after they get an attorney you've
09:51AM 4 got to go through that attorney, correct?

09:51AM 5 A. Correct.

09:51AM 6 Q. Because what happens with a court case is the prosecutor
09:51AM 7 is going to handle it once charges are filed, correct?

09:51AM 8 A. That's correct.

09:51AM 9 Q. And in this case, what happened is you take Mr. Abbate --
09:51AM 10 you took Mr. Anderson downtown, and you dropped off charges
09:51AM 11 at central booking, correct?

09:51AM 12 A. Correct.

09:51AM 13 Q. And so the jury understands, central booking is where
09:51AM 14 they hold somebody before they get arraigned for their first
09:51AM 15 time in court, correct?

09:51AM 16 A. Yes.

09:51AM 17 Q. And central booking can't hold somebody and received them
09:51AM 18 unless there is a charge, correct?

09:51AM 19 A. Yes.

09:51AM 20 Q. You've got to drop a defendant off with a charge or
09:51AM 21 they're gonna say we have nothing to hold this person,
09:51AM 22 correct?

09:51AM 23 A. Yeah, we fill out a booking sheet, and give the charges.
09:51AM 24 We also sign the felony complaint that's prepared by the
09:51AM 25 report technicians. And, so, he's charged at that point,

09:51AM 1 yes.

09:51AM 2 Q. Right. So -- so, Mr. Anderson is charged by the time you
09:52AM 3 drop him off at central booking, correct?

09:52AM 4 A. Yes.

09:52AM 5 Q. That's what that process facilitates, correct?

09:52AM 6 A. That's correct.

09:52AM 7 Q. And you mentioned a term felony complaint, correct?

09:52AM 8 A. That's correct.

09:52AM 9 Q. That is a document specific to New York State Court that
09:52AM 10 initially charges the defendant with some felony, correct?

09:52AM 11 A. That's right.

09:52AM 12 Q. So that's what Mr. Anderson was dropped off at Buffalo --
09:52AM 13 at the central booking with, correct?

09:52AM 14 A. That's correct.

09:52AM 15 Q. Okay. So it would absolutely be incorrect to say that
09:52AM 16 Wayne Anderson was not charged; is that a fair
09:52AM 17 characterization?

09:52AM 18 A. Yes.

09:52AM 19 Q. Okay. Now, I think you mentioned on your direct, do you
09:52AM 20 recall these defendants, Mr. Anderson and Mr. Abbate, being
09:52AM 21 charged with Class C felonies, correct?

09:52AM 22 A. Yes.

09:52AM 23 Q. And Class C felonies, I think you told us, are for
09:52AM 24 anything above 10 pounds of marijuana in New York State
09:52AM 25 Court, correct?

09:53AM 1 A. Yes.

09:53AM 2 Q. It's essentially the highest marijuana charge that the
09:53AM 3 state courts have that you can bring, correct?

09:53AM 4 A. The highest possession charge.

09:53AM 5 Q. Possession charge. So whether somebody's got 1,000
09:53AM 6 kilograms of marijuana or it's a little more than 10 pounds,
09:53AM 7 that's the charge they get for possession, correct?

09:53AM 8 A. That is correct.

09:53AM 9 Q. Okay. Now, you had experience with other drug cases with
09:53AM 10 other substances when you were at State police, correct?

09:53AM 11 A. Yes.

09:53AM 12 Q. There do exist higher level charges for other types of
09:53AM 13 substances, correct?

09:53AM 14 A. Yes.

09:53AM 15 **MR. TRIPI:** Objection. New York State penalties for
09:53AM 16 other charges. Relevance, 403.

09:53AM 17 **THE COURT:** Overruled.

09:53AM 18 **BY MR. MacKAY:**

09:53AM 19 Q. So, there are, for example, there are Class A2 and Class
09:53AM 20 B felonies, correct?

09:53AM 21 A. That's correct.

09:53AM 22 Q. And in sum and substance, those can carry more penalties
09:53AM 23 than a Class C felony, correct?

09:53AM 24 A. That's correct.

09:53AM 25 **THE COURT:** We're talking about penalties for drug

09:53AM 1 possession, is that what we're talking about?

09:53AM 2 **MR. MacKAY:** Yes, correct.

09:53AM 3 **BY MR. MacKAY:**

09:54AM 4 Q. You drop Mr. Anderson off at central booking, correct?

09:54AM 5 A. Yes.

09:54AM 6 Q. You gave him the paperwork so he can be charged, correct?

09:54AM 7 A. Yes.

09:54AM 8 Q. And the drugs are sent down to your State police

09:54AM 9 laboratory for testing, correct?

09:54AM 10 A. I believe they were, yes.

09:54AM 11 Q. Did you at some point in time see a lab report come back
09:54AM 12 noting that the substance was, in fact, marijuana?

09:54AM 13 A. No, I don't recall seeing a lab report.

09:54AM 14 Q. Okay. But evidence was taken from the scene of

09:54AM 15 17 Elmview Place, correct?

09:54AM 16 A. Yes. I've seen an evidence log, but again, I was

09:54AM 17 assisting on this case, I was not the, as we refer to, as the

09:54AM 18 case agent who would be responsible for accumulating all

09:54AM 19 those reports. But I did review a -- what we call a general

09:54AM 20 2 evidence record.

09:54AM 21 Q. Okay. But you didn't transport any evidence away from

09:54AM 22 the scene, correct?

09:54AM 23 A. That's correct.

09:54AM 24 Q. Just the defendant, correct?

09:54AM 25 A. Just the defendant.

09:55AM 1 Q. And when you were at 17 Elmview Place executing the
09:55AM 2 search warrant, Mr. Bongiovanni was not present at the scene,
09:55AM 3 correct?

09:55AM 4 A. That's right.

09:55AM 5 Q. There was no -- this was solely a State police
09:55AM 6 investigation here in Buffalo, correct?

09:55AM 7 A. Yes.

09:55AM 8 Q. With the exception of the Illinois State Police
09:55AM 9 component, this was New York State Police doing what it did
09:55AM 10 on that date at that location, correct?

09:55AM 11 A. That's correct.

09:55AM 12 Q. I think you mentioned it was Buffalo Police Department
09:55AM 13 may be involved with SWAT?

09:55AM 14 A. I don't believe the Buffalo Police Department was
09:55AM 15 involved.

09:55AM 16 Q. You guys have your own Special Weapons and Tactics team?

09:55AM 17 A. Yeah, it was the SORT team, Special Operations and Rescue
09:55AM 18 Team, I believe it stands for.

09:55AM 19 Q. Okay. So long story short, there's no DEA personnel on
09:55AM 20 the scene on November 25th, 2012?

09:55AM 21 A. No, there's not.

09:55AM 22 Q. And just to be clear, Mr. Bongiovanni doesn't reach out
09:55AM 23 to you at any point in time, for example, when you're driving
09:55AM 24 Mr. Anderson down to central booking, correct?

09:56AM 25 A. That's correct.

09:56AM 1 Q. You don't hear from him until several days later,
09:56AM 2 correct?

09:56AM 3 A. That's right.

09:56AM 4 Q. You approximated it to be 48 hours or so?

09:56AM 5 A. Yes.

09:56AM 6 Q. But let's back up. You leave Mr. Anderson at central

09:56AM 7 booking, and that's the process in your mind that starts a

09:56AM 8 State court case, correct?

09:56AM 9 A. That's correct.

09:56AM 10 Q. Because you filled out -- or, somebody has filled out a

09:56AM 11 felony complaint, and that will to your knowledge wind up

09:56AM 12 being handled by a State court prosecutor, correct?

09:56AM 13 A. Correct.

09:56AM 14 Q. And if there's a State court crime charged in Erie

09:56AM 15 County, New York, that's generally going to be the Erie

09:56AM 16 County District Attorney's Office, correct?

09:56AM 17 A. That's correct.

09:56AM 18 Q. The New York State Attorney Generals can do some

09:56AM 19 prosecution, but generally most crimes in Erie County, to

09:56AM 20 your knowledge, are going to be prosecuted by an Assistant

09:56AM 21 District Attorney, correct?

09:56AM 22 A. That's correct.

09:56AM 23 Q. And you actually now work at that office, correct?

09:57AM 24 A. That's correct.

09:57AM 25 Q. You work as an investigator assisting the office, and the

09:57AM 1 attorneys in particular, correct?

09:57AM 2 A. That's correct.

09:57AM 3 Q. So, so let's go to this meeting.

09:57AM 4 It's preceded by, you think, at least a phone call or two
09:57AM 5 from Mr. Bongiovanni to set the meeting up?

09:57AM 6 A. Yes.

09:57AM 7 Q. Okay. And then you have the meeting, it's at the CNET
09:57AM 8 office, at the State -- the old State office building,
09:57AM 9 correct?

09:57AM 10 A. That's right.

09:57AM 11 Q. That's where your headquarters were at the time, correct?

09:57AM 12 A. That was a satellite office, but yes.

09:57AM 13 Q. Okay. And it's your understanding, going into this

09:57AM 14 meeting, that it's going to focus in some fashion on Wayne
09:57AM 15 Anderson, correct?

09:57AM 16 A. That's correct.

09:57AM 17 Q. Now when you actually have the meeting, Wayne Anderson is
09:57AM 18 not present, correct?

09:57AM 19 A. That's right.

09:57AM 20 Q. And based on what you know happens in State court cases,
09:58AM 21 Wayne Anderson would have been represented by a lawyer at
09:58AM 22 that point in time, correct?

09:58AM 23 A. Well, once the felony complaint is lodged, his right to a
09:58AM 24 counsel attaches, so he would have had an attorney.

09:58AM 25 Q. Right. So, you would not have been able to leave that

09:58AM 1 meeting and go call up Wayne Anderson personally --

09:58AM 2 A. No.

09:58AM 3 Q. -- correct?

09:58AM 4 A. That's correct.

09:58AM 5 Q. Right. Because he -- you would be breaking certain
09:58AM 6 rules, correct?

09:58AM 7 A. Correct.

09:58AM 8 Q. Now, to your recollection, the conversation has something
09:58AM 9 to do with Mr. Anderson possibly being able to be used by
09:58AM 10 DEA?

09:58AM 11 A. Yes.

09:58AM 12 Q. Okay. Now, do you recall whether Mr. Bongiovanni
09:58AM 13 specifically said we're going to use him as a confidential
09:58AM 14 informant, or whether it was more focused on what the nature
09:58AM 15 of the investigation was and what Mr. Anderson's exposure
09:58AM 16 was?

09:58AM 17 A. I don't believe that there was a conversation about
09:59AM 18 specifically using him as a confidential informant. It was
09:59AM 19 possibly the potential of, but more the investigation, our
09:59AM 20 arrest, our investigation, would have been possibly related
09:59AM 21 to Organized Crime --

09:59AM 22 Q. Okay.

09:59AM 23 A. -- as the focus of that meeting.

09:59AM 24 Q. So would it be fair to characterize this meeting is sort
09:59AM 25 of an interagency meeting to determine what happened on

09:59AM 1 November 12th -- 25th, 2012?

09:59AM 2 A. Yes, but also the potential to, again, as I testified
09:59AM 3 yesterday, to maybe take this case to a further level
09:59AM 4 federally, and it would -- it would require the cooperation
09:59AM 5 of Mr. Anderson.

09:59AM 6 Q. But in order to get there, obviously, you have to share
10:00AM 7 some details about what happened as part of this
10:00AM 8 investigation, correct?

10:00AM 9 A. Yeah, details and/or paperwork.

10:00AM 10 Q. Okay. Now, you told us a little bit about the
10:00AM 11 possibility that it could be used for a federal matter,
10:00AM 12 right?

10:00AM 13 A. Correct.

10:00AM 14 Q. Okay. But I think you told us before, though, this is
10:00AM 15 still somewhat generic, there's no specifics proposed,
10:00AM 16 correct?

10:00AM 17 A. Correct.

10:00AM 18 Q. Okay. And, you know, Mr. Bongiovanni never told you
10:00AM 19 something to the effect of we're going to adopt your case,
10:00AM 20 correct?

10:00AM 21 A. Correct.

10:00AM 22 Q. He never leaves the CNET office with any of the physical
10:00AM 23 evidence from the case, correct?

10:00AM 24 A. No evidence, no.

10:00AM 25 Q. Okay. So to your knowledge the drugs, any scales, or

10:00AM 1 anything else that was seized in this, stayed with State
10:00AM 2 police, correct?

10:00AM 3 A. Correct.

10:00AM 4 Q. And then you don't ever really hear from Mr. Bongiovanni
10:00AM 5 again with regard to this incident, correct?

10:00AM 6 A. No, I don't.

10:00AM 7 Q. Okay. Okay. Now, to your knowledge, after these two
10:01AM 8 defendants are arrested, the case proceeds to some degree,
10:01AM 9 correct?

10:01AM 10 A. Yes.

10:01AM 11 Q. Because you end up having to meet with the assigned
10:01AM 12 Assistant District Attorney at least once, correct?

10:01AM 13 A. I don't recall meeting with the assigned District
10:01AM 14 Attorney.

10:01AM 15 Q. Do you recall having any contact with him?

10:01AM 16 A. Not specifically, I mean, about this case.

10:01AM 17 Q. Do you recall the assigned assistant was ADA Paul
10:01AM 18 Williams?

10:01AM 19 A. I do believe it would have been Mr. Williams. He was the
10:01AM 20 chief of narcotics at the time. And we -- any cases we did
10:01AM 21 with the District Attorney at that time was with
10:01AM 22 Mr. Williams.

10:01AM 23 Q. Okay. And in your experience from the law enforcement
10:02AM 24 side before you got to the District Attorney's Office, what
10:02AM 25 office happens once a case is charged is sometimes the

10:02AM 1 prosecutor needs to reach out to the specific law enforcement
10:02AM 2 agents to get some information on the case, correct?

10:02AM 3 A. Correct.

10:02AM 4 Q. Sometimes they might say something like, hey, we're going
10:02AM 5 to be doing a pretrial hearing, we need you to be available
10:02AM 6 on a certain day on testimony?

10:02AM 7 **MR. TRIPI:** Objection. Speculative. 403, 401.

10:02AM 8 **THE COURT:** No overruled.

10:02AM 9 **BY MR. MacKAY:**

10:02AM 10 Q. Did you get my question?

10:02AM 11 A. No, can you repeat it.

10:02AM 12 Q. So sometimes you might be called in to testify for a
10:02AM 13 pretrial hearing?

10:02AM 14 A. That's correct.

10:02AM 15 Q. You could be called in to testify for trial testimony,
10:02AM 16 correct?

10:02AM 17 A. That's correct.

10:02AM 18 Q. And sometimes you can be called because there's a proffer
10:02AM 19 session going on where your presence as the law enforcement
10:02AM 20 agent might be needed, correct?

10:02AM 21 A. Correct.

10:02AM 22 Q. And you've sat in on those before, correct?

10:02AM 23 A. Yes.

10:02AM 24 Q. That's really what we're talking about when there are
10:02AM 25 cooperation -- when cooperation is going on, correct?

10:03AM 1 A. That's correct.

10:03AM 2 Q. A charged defendant comes in with their lawyer, sits down
10:03AM 3 with the prosecutor, and then usually with a law enforcement
10:03AM 4 agent, correct?

10:03AM 5 A. That's correct.

10:03AM 6 Q. And you've done that in cases where you've been the law
10:03AM 7 enforcement agent in that room for a proffer session,
10:03AM 8 correct?

10:03AM 9 A. Yes.

10:03AM 10 Q. And you were never contacted by an Assistant District
10:03AM 11 Attorney's Office in this case saying we're going to do one
10:03AM 12 of those, correct?

10:03AM 13 A. I don't recall being contacted for a proffer on this
10:03AM 14 case. Again, I was assisting, I wasn't what we refer to as
10:03AM 15 the case agent. So, I don't know if I would have been
10:03AM 16 directly contacted about this case.

10:03AM 17 Q. So you're telling us that more likely who would have been
10:03AM 18 contacted if there was any need from input from the -- from
10:03AM 19 the law enforcement side would have been a supervising
10:03AM 20 investigator?

10:03AM 21 **MR. TRIPI:** Objection as to more likely. Again,
10:03AM 22 Judge, that's speculative, lack of personal knowledge.

10:04AM 23 **THE COURT:** No, overruled.

10:04AM 24 **THE WITNESS:** I may have been contacted as a witness
10:04AM 25 investigator in the case, someone that was assisting. The

10:04AM 1 case agent is always the one that brings the paperwork, the
10:04AM 2 evidence logs, any photographs. And there may or may not be
10:04AM 3 assisting investigators, depending if the Assistant District
10:04AM 4 Attorney wanted to interview us, if we picked up a certain
10:04AM 5 piece of evidence, they want to interview us about picking up
10:04AM 6 the evidence at the scene, or if there were some statements
10:04AM 7 made at the time by the defendants, they may want to --

10:04AM 8 **BY MR. MacKAY:**

10:04AM 9 Q. But if I'm understanding you correctly, the point person
10:04AM 10 then at the District Attorney's Office might reach out to is
10:04AM 11 going to be the case agent, correct?

10:04AM 12 A. Correct.

10:04AM 13 Q. And in this matter involving Wayne Anderson, you were not
10:04AM 14 the case agent, correct?

10:04AM 15 A. That's correct.

10:04AM 16 Q. Do you recall who the case agent was in the case?

10:05AM 17 A. I believe it was Investigator Kevin Gallagher. He put
10:05AM 18 the report together.

10:05AM 19 Q. Okay. And then at some point in time, do you come to
10:05AM 20 learn that the case entirely has been resolved?

10:05AM 21 A. Much later, yes.

10:05AM 22 Q. Okay. And was it your understanding that one of the
10:05AM 23 defendants pleaded guilty and received probation?

10:05AM 24 A. Yes.

10:05AM 25 Q. And that would be Mr. Abbate?

10:05AM 1 A. That's correct.

10:05AM 2 Q. And Mr. Anderson was dismissed?

10:05AM 3 A. That's correct.

10:05AM 4 Q. Okay. And again, you've done many cases that involve
10:05AM 5 codefendants over the years, as a law enforcement officer?

10:05AM 6 A. Yes.

10:05AM 7 Q. Not uncommon for a case where multiple defendants are
10:05AM 8 charged that not all of them end in a conviction, correct?

10:05AM 9 A. That's correct.

10:05AM 10 Q. And you were not called, as you can recall, by the
10:06AM 11 District Attorney's Office for any input on how this case was
10:06AM 12 to resolve, correct?

10:06AM 13 A. That's correct.

10:06AM 14 Q. Nobody reached out to you, like Paul Williams, saying we
10:06AM 15 want your input on how to resolve this case, correct?

10:06AM 16 A. That's correct.

10:06AM 17 Q. And obviously, like you said, you never were part of any
10:06AM 18 proffer session in this case, correct?

10:06AM 19 A. Yes, that's correct.

10:06AM 20 Q. And you were never contacted by any attorney claiming to
10:06AM 21 represent Mr. Anderson, correct?

10:06AM 22 A. No, I was not. Or Mr. Abbate.

10:06AM 23 Q. And you never had to go to the State grand jury to
10:06AM 24 testify regarding this case?

10:06AM 25 A. I do not recall attending grand jury on this case.

10:06AM 1 Q. And did you come to learn later, though, that DEA did
10:07AM 2 seize an amount of money connected to this case?

10:07AM 3 A. You know, there -- there is a procedure where DEA has --
10:07AM 4 we will bring the money to DEA for them to seize related to
10:07AM 5 the case and a lot of other cases, but say, it's a seizure
10:07AM 6 program.

10:07AM 7 Q. Okay. So my question to you, though, is do you recall in
10:07AM 8 this specific case there was an amount of money seized by the
10:07AM 9 DEA?

10:07AM 10 A. It would have been very possible that we had DEA seizure,
10:07AM 11 but I don't recall any paperwork or seeing that process.
10:07AM 12 Again, that's something that the case agent and probably a
10:07AM 13 supervisor, because it's currency, would handle.

10:07AM 14 Q. Okay. So if that happened, you don't have any personal
10:07AM 15 knowledge of whether it happened in this case --

10:07AM 16 A. Correct.

10:07AM 17 Q. -- is that fair to say?

10:07AM 18 A. That's correct.

10:07AM 19 Q. Okay. Now, let's go back. Mr. Bongiovanni and his law
10:08AM 20 enforcement partner, Joe Palmieri, meet with you, correct?

10:08AM 21 A. That's correct.

10:08AM 22 Q. And at that point in time, Mr. Anderson has already been
10:08AM 23 charged in State court, correct?

10:08AM 24 A. Yes.

10:08AM 25 Q. The case has been handed over for prosecution, correct?

10:08AM 1 A. Yes.

10:08AM 2 Q. And you're not the case agent, correct?

10:08AM 3 A. That's right.

10:08AM 4 Q. So, as you sit here today, there's no action you took

10:08AM 5 that was any different than when a case is normally handed

10:08AM 6 off; is that fair to say?

10:08AM 7 A. Yes.

10:08AM 8 Q. Okay. Meaning that you've essentially taken the State

10:08AM 9 court prosecutors a packaged-up case ready to go for

10:08AM 10 prosecution, correct?

10:08AM 11 A. Yes.

10:08AM 12 Q. You've arrested and delivered the defendant down to

10:08AM 13 central booking with charges, correct?

10:08AM 14 A. Yes.

10:08AM 15 Q. And while you might be contacted in the future about the

10:08AM 16 case from the prosecutor if your assistance was needed, that

10:08AM 17 just wasn't done in this case, correct?

10:08AM 18 A. Correct.

10:08AM 19 Q. But you did not abandon any further angles of

10:09AM 20 investigation, correct?

10:09AM 21 A. We didn't abandon any, nor did we commence any.

10:09AM 22 Q. Nor did you start any. The case was handed off, and it

10:09AM 23 was ready to go for prosecution?

10:09AM 24 A. Yes.

10:09AM 25 Q. And then ultimately it resolves with at least one of the

1 defendants taking a guilty plea, correct?

2 A. Correct.

3 **MR. MacKAY:** Your Honor, can I just have one moment.

4 **THE COURT:** Sure.

5 **MR. MacKAY:** No further questions, Your Honor.

6 **THE COURT:** Redirect?

7 **MR. TRIPI:** Yes, Your Honor, thank you.

8

9 **REDIRECT EXAMINATION BY MR. TRIPI:**

10 Q. Good morning, Mr. O'Rourke.

11 A. Good morning.

12 Q. A few moments ago you were asked some questions regarding
13 State court versus Federal court, some of that interplay
14 where a case goes, correct?

15 A. Yes.

16 Q. In your experience, approximately 29 years of law
17 enforcement experience, generally, do federal charges provide
18 more leverage to induce an individual to cooperate?

19 A. Absolutely.

20 Q. Can you explain why?

21 A. It seems that federally, the penalties are more severe in
22 a lot of cases. And the time a defendant may serve seems to
23 be more severe or lengthier. And it's generally -- we would
24 feel that some of the cases, especially in overdose deaths or
25 those types of things, the federal prosecution is an almost

1 mandatory way to go compared with the state prosecution.

2 Q. In your experience in which venue, state or federal
3 prosecution, are charges reduced more, in your view?

4 **MR. MacKAY:** Objection to lack of personal knowledge.

5 **THE COURT:** Overruled.

6 **THE WITNESS:** My experience, which is mostly in the
7 State court, but I believe in the State court the charges are
8 reduced more often.

9 **BY MR. TRIPPI:**

10 Q. If you were looking to flip someone in a drug case, and
11 you had the option to pursue state charges or federal
12 charges, what would you as the investigator choose?

13 A. The federal charges.

14 Q. When you interacted with Mr. Bongiovanni within 48 hours
15 of the Anderson and Abbate arrests, was it your understanding
16 that Mr. Bongiovanni would either seek Mr. Anderson's
17 cooperation or attempt to leverage him with federal charges?

18 A. That was the usual routine in these type of cases. So
19 yes, I assumed that they would be attempting to approach one
20 or both of them to pursue federal charges.

21 Q. And when you were interacting with Mr. Bongiovanni, did
22 you trust what he was saying to you?

23 A. Yeah, of course.

24 Q. Did you have any reason to doubt it?

25 A. No.

10:12AM 1 Q. Is trust important amongst members of law enforcement?

10:12AM 2 A. Yes.

10:12AM 3 Q. Now, earlier during your testimony, Mr. MacKay asked you
10:13AM 4 a series of questions about Mr. Anderson being transported by
10:13AM 5 you, and your conversation with him, and him asking for a
10:13AM 6 lawyer; do you recall those questions?

10:13AM 7 A. Yes.

10:13AM 8 Q. And then he asked you some questions about the fact that
10:13AM 9 when someone asks for a lawyer, you can't speak with him
10:13AM 10 anymore; do you remember that question?

10:13AM 11 A. Yes.

10:13AM 12 Q. But on June 4th, 2020, you testified before a federal
10:13AM 13 grand jury, correct?

10:13AM 14 A. Yes.

10:13AM 15 Q. And you were under oath at that time, right?

10:13AM 16 A. That's correct.

10:13AM 17 Q. And you were asked to describe the conversation that you
10:13AM 18 had with Mr. Anderson while you transported him; is that
10:13AM 19 right?

10:13AM 20 A. Right.

10:13AM 21 Q. And in that conversation, as you relayed to the grand
10:14AM 22 jury under oath, you said Mr. Anderson did not want to
10:14AM 23 cooperate, period.

10:14AM 24 A. Yes.

10:14AM 25 Q. All right. In the grand jury, you didn't say --

10:14AM 1 **MR. MacKAY:** Judge, I'm going to object to the
10:14AM 2 leading.

10:14AM 3 **MR. TRIPI:** This is Rule 801(d)(1)(A), Your Honor.

10:14AM 4 **THE COURT:** No sustained.

10:14AM 5 **MR. TRIPI:** Were you asked this question --
10:14AM 6 proceeding under 801(d)(1)(A).

10:14AM 7 **THE COURT:** He objected to the leading.

10:14AM 8 **BY MR. TRIPI:**

10:14AM 9 Q. Were you asked this question: And can you describe how
10:14AM 10 that conversation went with Mr. Anderson to the best of your
10:14AM 11 recollection?

10:14AM 12 And did you give this answer: To the best of my
10:14AM 13 recollection, my habit and most of ours, probably the best
10:14AM 14 time to speak to someone is when he's more alone or just the
10:14AM 15 two of us talking, taking him downtown, as opposed to when
10:14AM 16 there's a bunch of people around or coconspirators or other
10:14AM 17 suspects. So that's what we did on the way down. Listen,
10:14AM 18 you're in trouble, you're looking at a felony charge. If you
10:14AM 19 want to be of assistance to yourself, we can talk to the DA's
10:14AM 20 office and, you know, depending on your criminal history, we
10:15AM 21 never make any promises, but we say we'll be able to assist
10:15AM 22 you, maybe if you provide some meaningful cooperation to us.
10:15AM 23 Mr. Anderson did not want to cooperate.

10:15AM 24 Were you asked that question, and did you give that
10:15AM 25 answer?

10:15AM 1 A. Yes, I did.

10:15AM 2 Q. So that answer did not involve reference to an attorney,
10:15AM 3 correct?

10:15AM 4 A. Correct.

10:15AM 5 Q. That was mentioned by Mr. MacKay today, correct?

10:15AM 6 A. Yes.

10:15AM 7 **MR. TRIPI:** No further questions.

10:15AM 8 **MR. MacKAY:** Brief recross, Your Honor.

10:15AM 9 **THE COURT:** Sure.

10:15AM 10

10:15AM 11 **RECROSS-EXAMINATION BY MR. MacKAY:**

10:15AM 12 Q. Mr. Anderson shuts the conversation down about going any
10:15AM 13 further about cooperation as you're driving him downtown to
10:15AM 14 central booking; is that fair to say?

10:15AM 15 A. Yes.

10:15AM 16 Q. Whether he invoked an attorney, or whether he said I just
10:15AM 17 don't want to cooperate, as you sit here today you knew that
10:15AM 18 whatever came out of that was he's not cooperating at this
10:15AM 19 point, correct?

10:15AM 20 A. Right.

10:15AM 21 Q. Now you talked about -- I think you phrase you used was
10:15AM 22 mandatory way to go with certain types of prosecutions; am I
10:16AM 23 recalling that correct from your redirect?

10:16AM 24 A. Yes.

10:16AM 25 Q. Now, law enforcement doesn't necessarily get to decide

10:16AM 1 which direction charges go in, correct?

10:16AM 2 A. That's correct.

10:16AM 3 Q. That's for the prosecutors both, state and federal?

10:16AM 4 **MR. TRIPI:** Objection. Asked and answered on his
10:16AM 5 direct.

10:16AM 6 **THE COURT:** No, overruled.

10:16AM 7 **BY MR. MacKAY:**

10:16AM 8 Q. That's for either the state or federal prosecutors to
10:16AM 9 decide, correct?

10:16AM 10 A. That's correct.

10:16AM 11 Q. Because they are the -- the United States or the People's
10:16AM 12 representatives in court, correct?

10:16AM 13 A. Correct.

10:16AM 14 Q. And to your knowledge, they have the discretion to decide
10:16AM 15 which charges to prosecute, correct?

10:16AM 16 A. Correct.

10:16AM 17 Q. And how to resolve those cases, correct?

10:16AM 18 A. Correct. Sometimes supervisory personnel from our agency
10:16AM 19 will say we're not taking this federal, or we're not taking
10:16AM 20 this state. We may contact the Attorney General's Office.

10:16AM 21 So, they get a little bit of discretion and direction.

10:17AM 22 Q. But ultimately, prosecutors make the final call because
10:17AM 23 they're the ones in court, correct?

10:17AM 24 A. Correct.

10:17AM 25 Q. And you talked a little bit about how State courts, most

10:17AM 1 of your experience is over there, correct?

10:17AM 2 A. Yes.

10:17AM 3 Q. And fair to say State courts are busy courts, correct?

10:17AM 4 A. Yes.

10:17AM 5 Q. There's a lot of prosecutions in any one county, correct?

10:17AM 6 A. That's correct.

10:17AM 7 Q. And Erie County is a populous county, correct?

10:17AM 8 A. Yes.

10:17AM 9 Q. A lot of criminal charges being filed throughout the
10:17AM 10 year, correct?

10:17AM 11 A. Yes.

10:17AM 12 Q. You now work in the Erie County District Attorney's
10:17AM 13 Office. Fair to say that's a very busy office, correct?

10:17AM 14 A. Yes, it is.

10:17AM 15 Q. Feels even overwhelmed, correct?

10:17AM 16 **MR. TRIPI:** Objection as to how the Court feels.

10:17AM 17 **THE COURT:** Yeah, sustained.

10:17AM 18 **BY MR. MacKAY:**

10:17AM 19 Q. Has your experience as an investigator in that office
10:17AM 20 been that sometimes you can't even keep up with the work?

10:17AM 21 **MR. TRIPI:** Objection. He's asking about his
10:17AM 22 experience as a DA's investigator, Your Honor.

10:18AM 23 **MR. MacKAY:** In his context at the DA's office.

10:18AM 24 **THE COURT:** Yeah, sustained -- or, overruled. Go
10:18AM 25 ahead.

10:18AM 1 **THE WITNESS:** I don't feel overwhelmed. I mean, my
10:18AM 2 tasks are fairly manageable. As far as the Assistant District
10:18AM 3 Attorney's, I don't know how they feel.

10:18AM 4 **BY MR. MacKAY:**

10:18AM 5 Q. Okay. And you talked a little bit about what usual
10:18AM 6 routine was in conjunction with -- with meetings with other
10:18AM 7 agencies; do you recall that?

10:18AM 8 A. Yes.

10:18AM 9 Q. Okay. But to be clear, you recall no specifics being
10:18AM 10 discussed about what was going to come out of that
10:18AM 11 interaction, correct?

10:18AM 12 A. Yes.

10:18AM 13 **MR. MacKAY:** Okay. No further questions, Your Honor.

10:18AM 14 **THE COURT:** Anything further, Mr. Tripi?

10:18AM 15 **MR. TRIPI:** No, Your Honor.

10:18AM 16 **THE COURT:** You can step down, sir, thank you.

10:18AM 17 **THE WITNESS:** Thank you.

10:18AM 18 (Witness excused at 10:18 a.m.)

10:18AM 19 (Excerpt concluded at 10:18 a.m.)

10:18AM 20 CERTIFICATE OF REPORTER

10:18AM 21 In accordance with 28, U.S.C., 753(b), I certify that
10:18AM 22 these original notes are a true and correct record of
10:18AM 23 proceedings in the United States District Court for the
Western District of New York on February 21, 2024.
10:18AM 24

10:18AM 25 s/ Ann M. Sawyer
Ann M. Sawyer, FCRR, RPR, CRR
Official Court Reporter
U.S.D.C., W.D.N.Y.

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EXAMINATION OF MICHAEL O'ROURKE - DAY 2

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